IN THE SUPREME COURT
STATE OF GEORGIA

Case No. S23A0167

JOHN KNOX, et al.,
Appellants,

v.

STATE OF GEORGIA,
Appellee,

On Appeal from the Superior Court of Fulton County
Civil Action No. 2022CV364429

BRIEF OF AMICI CURIAE PROFESSORS MARY SARAH BILDER, SAUL CORNELL, AND PETER CHARLES HOFFER

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Amici Curiae Professor Mary Sarah Bilder, Saul Cornell, and Peter Charles Hoffer respectfully submit the following brief in support of Appellants.

INTEREST OF AMICI CURIAE

Amici curiae are constitutional historians and legal scholars who have devoted a substantial part of their research and writing to the history of early American law and constitutionalism. Professor Cornell's research has focused heavily on the Second Amendment and firearm regulation in the United States, and Professors Bilder and Hoffer are versed in the sources and scholarly debates necessary to understand the early history of the Second Amendment and comparable arms-bearing provisions in state constitutions. Their scholarship has been published by major university presses, in leading law journals, and in federal courts. Amici's interest in this case is in explaining the interplay between the Second Amendment and college campuses. Amici seek to explain why college campuses are "sensitive places" that fall outside the scope of the Second Amendment's guarantee.

Mary Sarah Bilder is the Founders Professor of Law at Boston College Law School. Her scholarship on the Founding Era and the early history of the Constitution has been published in the Harvard University Press, the George Washington Law Review, the Law and History Review, and many other leading academic journals and presses. *See e.g.*, MARY SARAH BILDER, MADISON'S HAND:

REVISING THE CONSTITUTIONAL CONVENTION (2015); Mary Sarah Bilder, *How Bad Were the Official Records of the Federal Convention?*, 80 GEO. WASH. L. REV. 1620 (2012); Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 L. & HIST. REV. 389 (2010).

Saul Cornell is the Paul and Diane Guenther Chair in American History at Fordham University. His scholarship on the history of gun rights and regulations has been published in the UC Davis Law Review, the William & Mary Law Review, the Stanford Law and Policy Review, and other leading academic journals and presses. *See e.g.*, Saul Cornell, *The Long Arc of Arms Regulation in Public: From Surety to Permitting, 1328-1928*, 55 UC DAVIS L. REV. 2545 (2022); Saul Cornell, *St. George Tucker and the Second Amendment: Original Understandings and Modern Misunderstandings*, 47 WM. & MARY L. REV. 1123 (2006); Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, the Lessons of History*, 17 STAN. L. & POL'Y REV. 571 (2006).

Peter Charles Hoffer is a Distinguished Research Professor of History at the University of Georgia. In addition to being directly affected by the laws at issue in this case, his scholarship illuminating early American history has been published in the Johns Hopkins University Press, the Oxford University Press, and many other leading academic journals and presses. *See, e.g.*, PETER CHARLES

HOFFER, FOR OURSELVES AND OUR POSTERITY: THE PREAMBLE TO THE FEDERAL CONSTITUTION IN AMERICAN HISTORY (2012); PETER CHARLES HOFFER, THE BRAVE NEW WORLD: A HISTORY OF EARLY AMERICA (2d ed. 2007); PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA (1998).

INTRODUCTION

In holding that the Second Amendment protects an individual's right to keep and bear arms, Justice Antonin Scalia wrote that "nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in ***sensitive places such as schools*** and government buildings." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (emphasis added). Though not a common term at the time, Founding Era sources are clear: college campuses are quintessential "sensitive places," and prohibitions on carrying firearms on college campuses are "consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). Put differently, an individual's right to keep and bear arms—as a matter of original public meaning—does not extend to college campuses.

That the Second Amendment was never meant to reach college campuses is made apparent by two bodies of historical evidence. First, colleges in the Founding Era, both before the ratification of the United States Constitution and through the antebellum period, had stringent rules prohibiting firearm possession

and use on campus. And second, beyond the Civil War, states regularly prohibited carrying guns in schools and in places designated for educational purposes. These bodies of evidence are relevant to this case because they reveal not only the general, nationwide understanding of the right to bear arms during the relevant period, but also Georgia's understanding of the right. Whether applied to the text, history, and tradition approach in *Heller*, or the analogic reasoning in *Bruen*, the historical evidence shows that college campuses were considered sensitive places for Second Amendment purposes.

ARGUMENT AND CITATION TO AUTHORITIES

I. Founding-era colleges prohibited firearms on campus.

"[T]here is a long history of forbidding firearms in educational institutions." Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 WM. & MARY BILL RTS. J. 459, 471 (2019). Indeed, forbidding firearms on college campuses in the United States dates back almost 400 years, more than a century before the ratification of the Constitution. As early as 1665, Harvard University—the first college in what was then the American colonies—banned students from having "a gun in his or their[] chambers or studies, or keeping[] for their use anywhere else in the town." The Laws of Harvard College, 1655, at 10 (1876), https://archive.org/details/acopylawsharvar00unkngoog; *see also* Harvard University, The History of Harvard, https://www.harvard.edu/about/history/ (last

visited Nov. 10, 2022). A century later, the same type of prohibition was in evidence. In 1745, Yale University prohibited students from possessing or firing "a Gun or Pistol" "in the College-Yard or College." Franklin Bowditch Dexter, 2 Biographical Sketches of the Graduates of Yale College 8 (1896), https://books.google.com/books/about/Biographical_Sketches_of_the_Graduates_o.html?id=qlEIAAAAMAAJ.

Harvard and Yale are private institutions, to be sure, but public universities in the Founding era were no less censorious on this issue. For example in 1810, the University of Georgia, one of the nation's oldest public institutions of higher education, passed a sweeping prohibition of guns on its campus: "[N]o student shall be allowed to keep any gun, pistol, Dagger, Dirk[,] sword cane[,] or any other offensive weapon in College or elsewhere, neither shall they or either of them be allowed to be possessed of the same out of the college in any case whatsoever." The Minutes of the Senate Academicus, 1799-1842, Univ. of Ga. Librs. § 86 (2008), https://dlg.galileo.usg.edu/guan/ua0148/pdfs/ua0148-002-004-001.pdf. The University of North Carolina, the nation's first public university, likewise enacted a total prohibition on possessing firearms in the early 1800s. The law provided: "No Student shall keep a dog, or firearms, or gunpowder. He shall not carry, keep, or own at the College, a sword, dirk, sword-cane, or any deadly

weapon."[1] Acts of the General Assembly and Ordinances of the Trustees for the Organization and Government of the University of North-Carolina 15 (Raleigh, Off. of the Raleigh Reg. 1838), https://books.google.com/books/about/Acts_of_the_General_Assembly_and_Ordinan.html?id=_HVNAAAAYAA.

To understand Founding-Era conceptions about the Second Amendment's reach at public universities, one need only look to the Founders' actions when they were entrusted with the task of devising regulations for the University of Virginia. In 1819, Thomas Jefferson established the state-supported University of Virginia. University of Virginia, About the University, https://www.virginia.edu/aboutuva (last accessed Nov. 10, 2022). While both Jefferson and James Madison were serving on the six-person University of Virginia Board of Visitors—the decision-making body for the university—the Board took an exceedingly strict view of guns on the Virginia campus, resolving: "No Student shall, within the precincts of the University, introduce, keep or use any spirituous or vinous liquors, keep or use weapons or arms of any kind, or gunpowder, keep a servant, horse or dog, appear in school with a stick, or any weapon."[2] Meeting Minutes of the University Board

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[1] In 1859, the University of North Carolina expanded its prohibition on carrying deadly weapons, applying it not just to the college, but also "within the village of Chapel Hill." Acts of the General Assembly and Ordinances of the Trustees for the Organization and Government of the University of North Carolina 31 (James M. Henderson 1859), https://docsouth.unc.edu/true/unc/unc.html.

[2] Former Governor of Georgia Nathan Deal used these meeting minutes as "enlightening evidence" when he vetoed a 2016 bill that would have allowed

of Visitors, 4-5 Oct. 1824, https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-4598.

And these colleges and universities were not historical aberrations. Instead, prohibitions like the ones above were common throughout the 19th century. *See* The Statutes of Rutgers College 16 (1825), https://babel.hathitrust.org/cgi/pt?id=hvd.hn5a36&view=1up&seq=16 (enacting a law that makes "possession of fire arms, gun-powder, or any other weapon of violence" a "misdemeanor"); Statutes of Dickinson College 14 (1826), https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t9281823p&view=1up&seq=14 ("No student shall keep for his use or pleasure, any riding beast; nor a dog, or gun, fire arms or ammunition."); State Laws & Regulations of the College of William & Mary 19 (1830), https://books.google.com/books/about/Laws_and_Regulations_of_the_College_of_W.html?id=ZKUaAAAAYAAJ ("Students are strictly forbidden to keep, or to have about their person, any dirk, sword, or pistol."); Laws of the College of New-Jersey 26 (1832), https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t7mp5s13h&view=1up&seq=2

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licensed owners to carry guns on Georgia college campuses. Nathan Deal, Governor of Georgia, Veto Statement (May 3, 2016), https://aaupgeorgia.files.wordpress.com/2016/01/governor-nathan-deal-veto-statement.pdf. In his veto statement, Governor Deal invoked *Heller*'s "sensitive places," stating that "colleges have been treated as sanctuaries of learning where firearms have not been allowed." *Id.*

6 ("No student shall . . . keep a dog, or gun, or fire-arms and ammunition of any kind, nor any sword, dirk, sword-cane, or any deadly weapon whatever.").

These historic gun regulations at American colleges, both before and after the ratification of the Constitution, show that firearms were not just traditionally regulated but were frequently prohibited altogether.

II. After the Civil War, states enacted laws prohibiting firearms at schools and places designated for educational purposes.

After the Civil War and the ratification of the Fourteenth Amendment, states adopted similar prohibitions on weapons in classrooms and in places where people assembled for educational, literary, scientific, or social purposes.

For example, not long after becoming a state, Texas passed "An Act Regulating the Right to Keep and Bear Arms." *See* 1870 Tex. Gen. Laws 63, https://firearmslaw.duke.edu/laws/1870-tex-gen-laws-63-an-act-regulating-the-right-to-keep-and-bear-arms-chap-46-%c2%a7-1/. It prohibited "any person" from going into "any school room or other place where persons are assembled for educational, literary or scientific purposes" with "a bowie-knife, dirk or butcher-knife, or fire-arms, whether known as a six shooter, gun or pistol of any kind." *Id.*

Missouri attempted multiple times to crack down on carrying or discharging weapons in schools. First, in 1879, Missouri passed a law that made it illegal "to discharge or fire off any gun, pistol or fire-arms of any description in the immediate vicinity of any . . . building used for school or college purposes." 1879

Mo. Laws 90, https://firearmslaw.duke.edu/laws/1879-mo-laws-90-an-act-to-prohibit-the-discharge-of-firearms-in-the-immediate-vicinity-of-any-courthouse-church-or-building-used-for-school-or-college-purposes-%c2%a7-1/. Four years later, Missouri went further and prohibited going into "any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, literary or social purposes" if the person had "upon or about his person any kind of fire arms, bowie knife, dirk, dagger, slung-shot, or other deadly weapon." 1883 Mo. Laws 76, https://firearmslaw.duke.edu/laws/1883-mo-laws-76-an-act-to-amend-section-1274-article-2-chapter-24-of-the-revised-statutes-of-missouri-entitled-of-crimes-and-criminal-procedure-%c2%a7-1/.

Arizona and Oklahoma enacted almost identical comprehensive statutory schemes regulating firearms.[3] Relevant here, both prohibited anyone except peace officers from carrying weapons "into any church or religious assembly, any school

[3] Though Arizona and Oklahoma were both territories at the time and would not become states until 1912 and 1907 respectively, the U.S. Constitution and its amendments apply equally to territories as to states. *See* JOSEPH STORY, 4 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1325 (1873), https://repository.law.umich.edu/cgi/viewcontent.cgi?filename=17&article=1105&context=books&type=additional ("What shall be the form of government established in the territories depends exclusively upon the discretion of Congress. Having a right to erect a territorial government, . . . [t]hey may confer upon it general legislative powers, subject only to the laws and constitution of the United States.").

room, or other place where persons are assembled for . . . educational or scientific purposes." 1889 Ariz. Sess. Laws 16-17, https://firearmslaw.duke.edu /laws/act-of-mar-18-1889-1889-ariz-sess-laws-16-17/; 1890 Okla. Sess. Laws 495, https://firearmslaw.duke.edu/laws/1890-okla-laws-495-art-47/. And weapons were defined broadly, including: "pistol, revolver, bowie knife, dirk, dagger, slung-shot, sword cane, spear, metal knuckles, or any other kind of knife or instrument manufactured or sold for the purpose of defense." *Id.*

Notably, Texas, Missouri, Arizona, and Oklahoma all banned weapons from polling places, which are undoubtedly "sensitive places" under *Heller* and *Bruen*. *Infra* Part III.

III. *Heller* and *Bruen* support a finding that public universities are "sensitive places."

Regulating—and even prohibiting—firearms on college campuses is "consistent with this Nation's historical tradition of firearm regulation," *Bruen*, 142 S. Ct. at 2126, precisely because college campuses have been considered "sensitive places" to which the Second Amendment does not extend. *See Heller*, 554 U.S. at 626. The reasoning in both *Heller* and *Bruen* provide ample support for that conclusion.

While the logic of *Heller* and *Bruen* differs in some respects, both opinions recognize that "the right secured by the Second Amendment is not unlimited." *Bruen*, 142 S. Ct. at 2128 (quoting *Heller* 554 U.S. at 626). Of course, the *Bruen*

Court clarified that the scope of the Second Amendment extends beyond the home, but it did so using a similar historical analysis undertaken by the *Heller* Court. *See id.* at 2122 (holding that "law-abiding citizens" have a "right to carry handguns publicly for their self-defense"); *Heller*, 554 U.S. at 635 (holding that law-abiding citizens have a right to possess handguns in the home for self-defense).

The Court in *Bruen* reiterated "[t]he test that we set forth in *Heller*," which "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." 142 S. Ct. at 2131. The *Bruen* Court provided several considerations to guide courts when determining whether a modern gun regulation has a sufficiently similar historical analogue: "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations." *Id.* at 2133 (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)). This analogical reasoning, the Court clarified, "is neither a regulatory straightjacket nor a regulatory blank check." *Id.* In other words, courts need not find a "historical twin" to uphold a modern gun regulation, but the similarity must be more than a "remote[] resembl[ance]." *Id.*

To illustrate, the Court considered "*Heller*'s discussion of 'longstanding' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.'" *Id.* "Although the historical record yields relatively few

18th- and 19th-century 'sensitive places' where weapons were altogether prohibited," the *Bruen* Court specified legislative assemblies, polling places, and courthouses in addition to *Heller*'s "schools and government buildings." *Id.*; *Heller*, 554 U.S. at 626. For modern gun prohibitions that do not have a historical twin, however, "courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Bruen*, 142 S. Ct. at 2133.

When confronted with laws prohibiting firearms on college campuses, courts must then ask: Does there exist a historical analogue for such a prohibition? While "historical analysis can be difficult" in some cases, *id.* at 2130 (quotation marks omitted), the analysis here is quite clear. Laws prohibiting guns on college campuses have historical analogues from the colonial era, through the Founding Era, and into the present day. Harvard and Yale prohibited weapons on campus before the Constitution was ratified. After ratification—and shortly after the first public university was founded—public universities established sweeping bans of deadly weapons on campus, including the firearm prohibition approved by Thomas Jefferson and James Madison's Board of Visitors at the University of Virginia.

These authorities prohibiting firearms from campus reveal the general, nationwide understanding during the relevant period that the Second Amendment

right to bear arms did not extend to college campuses. Georgia's own 200-year history of prohibiting firearms from campus confirms that Article I, Section I, Paragraph VIII of the Georgia Constitution incorporates the same limitations as the Second Amendment.[4]

It is thus clear—by way of historical analogue—that college campuses are indisputably "sensitive places" with a historical tradition of regulation of firearms. Even though the *Bruen* Court perhaps narrowed the possible number of "sensitive places," it nonetheless reiterated the doctrine's importance. In doing so, the Court "affirm[ed] and incorporate[d] the ancient common law tradition which, transplanted to America, developed in the law of several states which authorized government to protect citizens' liberties against weapons threats and to preserve public peace and order" in sensitive places. Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 NW. L. REV. 139, 175 (2021). Or, as the Virginia Supreme Court put it when holding George Mason University's firearm prohibition constitutional, "[t]he fact that [George Mason] is a school and that its buildings are

[4] Moreover, the Georgia Constitution has generally been interpreted in a manner consistent with the Second Amendment of the Constitution. *See Hertz v. Bennett*, 294 Ga. 62, 68 (2013) (concluding no violation of the right to bear arms under both the U.S. Constitution and the Georgia Constitution).

owned by the government indicates that [George Mason] is a 'sensitive place.'" *DiGiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 136 (2011).

CONCLUSION

For the foregoing reasons, the Second Amendment—as a matter of original meaning and evidenced by a long history of firearms prohibitions—does not extend to public universities.

Respectfully submitted this 10th day of November, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a true and correct copy of the foregoing **BRIEF OF AMICI CURIAE PROFESSORS MARY SARAH BILDER, SAUL CORNELL, AND PETER CHARLES HOFFER** to be served on the following counsel of record by U.S. mail:

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